Grespa Sdn Bhd v Pemungut Hasil Tanah, Negeri Kedah Darul Naim & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K-01–61 OF 2000
LOW HOP BING, ABU SAMAH AND SULAIMAN DAUD JJCA
10 FEBRUARY 2009

Land Law — Acquisition of land — Award — Reference by land administrator — High Court order — Appeal against — Whether appellant had right and interest in award of compensation — Whether appellant was tenant or otherwise occupier of land and buildings at time of Gazette notification

Land in Daerah Kota Star, Kedah ('the land') was compulsorily acquired for public purposes vide the Kedah State *Gazette* dated 13 April 1995 ('the *Gazette* notification'). The compensation in the sum of RM2,685,000, which was awarded in respect of the compulsory acquisition of the land and three buildings situated upon it, was to include the costs for removal of machineries and rewiring, transfer costs and loss of earnings among other things. At the time of the publication of the *Gazette* notification the land, which was registered in the name of Asean Chemical Fertiliser Sdn Bhd ('Asean Chemical'), was charged to Bank Kerjasama Rakyat Malaysia Bhd ('the bank') but on 28 February 1998 the land was transferred to and registered in the name of Rakyat Corporation. Both Asean Chemical and Rakyat Corporation are subsidiaries of the bank. On 6 June 1995 a notice under Form E of the Act was served on all persons having interests in the land to appear in an inquiry before the land administrator to state the nature of their respective interests so that the compensation could be paid to the person interested therein. At the inquiry the land administrator awarded the compensation to be paid to the appellant, who claimed to be the tenant and occupier of the land at the material time, as the person interested therein. However, when the award of compensation was disputed by Rakyat Corporation, which also claimed the right and interest therein, the land administrator deferred its payment and made a reference to the High Court under s 36(2) of the Land Acquisition Act 1960 ('the Act'). It was the appellant's claim that it was the tenant or otherwise the occupier of the land and buildings together with the machineries therein at the time of the *Gazette* notification. In its affidavit the appellant referred to a tenancy agreement between Asean Chemical, as the landlord, and Ryntex Corporation, the tenant from 1 October 1992 and expiring on 30 September 1995. Although the appellant was unable to adduce any direct evidence to prove that it was the tenant or occupier of the land, it submitted that such tenancy or occupancy could be inferred from the facts and circumstances surrounding the acquisition and the relationship that existed between the appellant and Rynex

Corporation. At first the appellant asserted that Rynex was the appellant's former name but when this assertion was challenged it averred that the appellant and Rynex were related companies as subsidiaries of the same holding company. The High Court judge found as a fact that the appellant was neither the tenant nor the occupier of the land or the buildings thereon to have any interest in the said compensation and made an order for the compensation to be paid to the bank. This was the appellant's appeal against that decision. The sole issue to be determined in this appeal was whether the appellant had a right and interest in the award of compensation.

Held, dismissing the appeal with no order as to costs:

(1) The evidence clearly showed that the tenancy agreement between Asean Chemical and Rynex was from 1 October 1992 to 30 September 1995 and that Rynex's application to renew the said tenancy was rejected by the bank as the lien holder. In fact the bank had decided not to enter into any tenancy agreement with any other party other than Rynex. By reason thereof it was not probable that Asean Chemical or the bank could have given its consent for Rynex to sublet the land or buildings to the appellant or to otherwise let the appellant into occupation thereof. In any event there was no evidence adduced by the appellant to show such subletting or occupation (see paras 16–17).

(2) Even if the appellant and Rynex were related companies as subsidiaries of the same holding company, that in itself did not confer on the appellant any right or interest to the tenancy agreement unless it could be shown that it had sublet the land or buildings to the appellant or allowed it to occupy the same (see paras 18–19).

(3) Having viewed all the evidence adduced, a tenancy agreement could not be inferred from all the surrounding circumstances. At the most the appellant was a tenant at will and was thus excluded from the definition of 'person interested' under s 2 of the Act. The appellant had failed to prove its claim on a balance of probability (see paras 20–21).

[Bahasa Malaysia summary

Tanah di Daerah Kota Star, Kedah ('tanah tersebut') telah diperoleh secara paksa bagi tujuan awam melalui Warta Negeri Kedah bertarikh 13 April 1995 ('pemberitahuan warta tersebut'). Ganti rugi berjumlah RM2,685,000, yang mana telah diawardkan berkaitan dengan pengambilan secara paksa tersebut dan tiga bangunan yang terletak di atasnya, adalah termasuk kos untuk memindahkan jentera-jentera dan pemasangan semula wayar, kos pemindahan dan kehilangan pendapatan antara perkara-perkara lain. Pada masa penerbitan pemberitahuan warta, tanah tersebut, yang mana telah didaftarkan atas nama Asean Chemical Fertiliser Sdn Bhd ('Asean Chemical'), telah dicagarkan kepada Bank Kerjasama Rakyat Malaysia Bhd ('bank tersebut') tetapi pada 28

Februari 1998, tanah tersebut telah dipindah milik dan didaftarkan atas nama Rakyat Corporation. Kedua-dua Asean Chemical dan Rakyat Corporation merupakan subsidiari kepada bank tersebut. Pada 6 Jun 1995, notis di bawah Borang E Akta telah disampaikan kepada kesemua mereka yang mempunyai faedah terhadap tanah tersebut untuk hadir bagi siasatan di hadapan pentadbir tanah untuk menyatakan sifat faedah masing-masing supaya ganti rugi boleh diberikan kepada orang-orang yang berkepentingan ke atasnya. Semasa siasatan tersebut, pentadbir tanah telah mengaward ganti rugi untuk dibayar kepada perayu, yang telah mendakwa dirinya sebagai penyewa dan penghuni tanah pada masa material itu, sebagai orang yang berkepentingan. Walau bagaimanapun, apabila award bagi ganti rugi telah dipertikaikan oleh Rakyat Corporation, yang juga telah menuntut hak dan faedah ke atasnya, pentadbir tanah telah menangguhkan bayaran dan membuat rujukan kepada Mahkamah Tinggi di bawah s 36(2) Akta Pengambilan Tanah 1960 ('Akta tersebut'). Menjadi tuntutan perayu bahawa ia merupakan penyewa atau penghuni tanah dan bangunan-bangunan tersebut bersama dengan alat-alat jentera di dalamnya pada masa pemberitahuan warta tersebut. Di dalam afidavitnya, perayu telah merujuk kepada perjanjian sewa antara Asean Chemical, sebagai tuan tanah dan Ryntex Corporation, penyewa dari 1 Oktober 1992 dan yang mana habis tempoh pada 30 September 1995. Meskipun perayu tidak dapat mengemukakan sebarang keterangan langsung untuk membuktikan bahawa ia merupakan penyewa atau penghuni tanah tersebut, ia berhujah bahawa kesimpulan berkenaan dengan penyewaan atau penghunian tersebut boleh dibuat daripada fakta-fakta dan keadaan persekitaran pemerolehan dan hubungan yang wujud antara perayu dan Rynex Corporation. Pada mulanya, perayu menyatakan bahawa Rynex merupakan nama terdahulu perayu tetapi apabila pengataan tersebut telah dicabar, ia menyatakan bahawa perayu dan Rynex adalah syarikat-syarikat yang berhubung kait sebagai subsidiari syarikat induk yang sama. Hakim Mahkamah Tinggi mendapati pada hakikatnya perayu bukanlah penyewa atau penghuni tanah atau bangunan-bangunan di atasnya untuk memperoleh sebarang faedah dalam ganti rugi tersebut dan telah memberi perintah bagi ganti rugi untuk dibayar kepada bank tersebut. Ini merupakan rayuan perayu terhadap keputusan tersebut. Isu utama untuk diputuskan adalah sama ada perayu mempunyai hak dan faedah dalam award bagi ganti rugi tersebut.

Diputuskan, menolak rayuan tanpa perintah untuk kos:

(1) Keterangan jelas menunjukkan bahawa perjanjian sewa antara Asean Chemical dan Rynex adalah dari 1 Oktober 1992 sehingga 30 September 1995 dan bahawa permohonan Rynex untuk memperbaharui penyewaan tersebut telah ditolak oleh bank sebagai pemegang lien. Sebenarnya bank tersebut telah memutuskan untuk tidak menandatangani sebarang perjanjian sewa dengan mana-mana pihak selain daripada Rynex. Atas sebab tersebut, adalah tidak

mungkin bagi Asean Chemical atau bank untuk memberikan persetujuan kepada Rynex untuk menyewakan tanah dan bangunan-bangunan kepada perayu atau sebaliknya membenarkan perayu untuk penghunian. Dalam sebarang keadaan, tidak terdapat keterangan yang dikemukakan oleh perayu untuk menunjukkan penyewaan semula atau penghunian tersebut (lihat perenggan 16–17).

(2) Walaupun perayu atau Rynex merupakan syarikat-syarikat yang berhubung kait sebagai subsidiari syarikat induk yang sama, ia dengan sendirinya tidak memberikan sebarang hak atau faedah kepada perayu terhadap perjanjian sewa melainkan adalah dapat dibuktikan bahawa ia telah menyewa atau membenarkan perayu menghuni tanah atau bangunan-bangunan tersebut (lihat perenggan 18–19).

(3) Setelah melihat kesemua keterangan yang dikemukakan, suatu perjanjian sewa tidak dapat disimpulkan daripada kesemua keadaan persekitaran. Paling tidak pun, perayu adalah penyewa sementara dan oleh itu ia dikecualikan daripada definisi 'orang berkepentingan' di bawah s 2 Akta. Perayu gagal untuk membuktikan tuntutannya atas imbangan kebarangkalian (lihat perenggan 20–21).]

Notes

For cases on award, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1882–1929.

Cases referred to

Owners of the Cargo Laden on the Albacrus v The Albazero [1977] AC 774, HL (refd)

Legislation referred to

Evidence Act 1950 s 101
Land Acquisition Act 1960 ss 2, 36(2), Forms E, G, H

Appeal from: Land Reference No 15–49 of 1998 (High Court, Alor Star)

K Nadarajah (Bosco Philip Anthony and AG Das with him) (Tan Bak Lee & Co) for the appellant.
Murtazadi Amran (State Legal Advisor, Kedah) for the first respondent.
Zamani Ibrahim (Mohd Hanif Idris with him) (Zamani Ibrahim Tarmizi & Co) for the second respondent.

Sulaiman Daud JCA:

[1] This is an appeal against the decision of the High Court at Alor Setar in respect of a land reference under s 36(2) of the Land Acquisition Act 1960 ('the Act') whereby the learned judge ordered the award of compensation in the sum

of RM2,685,000 ('the said compensation') to be paid to Bank Kerjasama Rakyat Bhd ('the bank'). The appellant is one of the persons claiming an interest in the said compensation.

[2] The said compensation was awarded in respect of three factory buildings, the costs for removal of machineries and rewiring, transfer cost, loss of earning, etc pursuant to a compulsory acquisition of certain land on which the buildings were situated. After hearing submissions of counsel from both parties, we dismissed the appeal with no order as to costs. We now give our reasons for the decision.

[3] The reference relates to land known as Lot 936 HS (M), Mukim Kuala Kedah, Daerah Kota Star, Kedah ('the said land'). It was acquired for public purpose vide Kedah State *Gazette* dated 13 April 1995 ('*Gazette* notification').

[4] At the time of the publication of the *Gazette* notification the said land was registered in the name of Asean Chemical Fertilizer Sdn Bhd ('Asean Chemical'). It was charged to Bank Kerjasama Rakyat Malaysia Bhd ('the bank') which also entered a lien holder's caveat over the land. Subsequently, on 28 February 1998 the said land was transferred to and registered in the name of Rakyat Corporation. Both Asean Chemical and Rakyat Corporation are subsidiaries of the bank.

[5] Form E of the Act ('Form E') was issued on 6 June 1995 notifying all persons having interests in the said land to appear before the land administrator at the specified time and place to state the nature of their respective interests in the land. The said inquiry was held at Kota Setar land office on 30 November 1996 where the land administrator awarded the said compensation to the appellant Grespa Sdn Bhd ('Grespa') as the person interested therein.

[6] The said award of compensation was disputed by Rakyat Corporation which also claimed the right and interest therein. When the land administrator deferred its payment, the appellant Grespa moved the court by way of an originating motion for mandamus to order the land administrator to pay the same. Rakyat Corporation responded by filing a separate originating motion for certiorari to quash the said award made in Form G of the Act ('Form G'). Both parties however withdrew their respective motions when the land administrator made the said reference to the court. They also gave notice of their intention to use the affidavits filed pursuant thereto in the said reference.

[7] The appellant is aggrieved by the decision of the court which made the order for the said compensation to be paid to the bank, and hence this appeal.

[8] Learned counsel for the appellant submitted that the relevant date for the determination of such right and interest is the date of publication of the *Gazette* notification, ie 13 April 1995. He pointed out at that date there was a tenancy agreement in force between Rynex Corporation, as the tenant, and Asean Chemical, as the landlord and registered owner of the said land commencing from 1 October 1992 and expiring on 30 September 1995 ('the tenancy agreement').

[9] From the affidavit evidence and submission of learned counsel, it is apparent to us that the substratum of the appellant's claim is premised on the supposition that Grespa was the tenant or otherwise the occupier of the said land and buildings together with the machineries therein at the time of the *Gazette* notification.

[10] The question is whether the appellant was such tenant or occupier at the said date, or the latest at the time of the inquiry. This is a question of fact. It is trite law that he who alleges must prove it. This is clearly provided by s 101 of the Evidence Act 1950 which read as follows:

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(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that these facts exist.

(2) When the person is bound to prove the existence of any fact, it is said that the burden of proof lies on him.

[11] In the present appeal it is the appellant who had asserted that it was the tenant or occupier of the said land and the buildings thereon at the material time, and therefore the onus is on the appellant to satisfy the court of such fact.

[12] Before us, learned counsel for the appellant candidly agreed that there was no direct evidence to show that the appellant Grespa was the tenant or occupier of the said land. Nevertheless it is submitted that such tenancy or occupancy can be inferred from the facts and circumstances surrounding the acquisition and the relationship between Rynex Corporation and Grespa.

[13] The circumstances surrounding the appellant's claim appear from the various affidavits sworn by its director Ng Long Seng, which can be summarised as follows:

(a) Grespa was the tenant of the said land and the buildings thereon at the date of the *Gazette* notification on 13 April 1995, which tenancy was further extended to a monthly tenancy beginning from 1 March 1996.

(b) Grespa was served with the said Form E giving notice of the intended acquisition, and that the deponent attended the inquiry before the land administrator on 30 November 1996 where he presented the appellant's claim on the said buildings and machineries.

(c) The award of compensation in Form G dated 30 November 1996 was made in the name of, and issued to, the appellant as the person interested thereto.

(d) Form H of the Act, also dated 30 November 1996 ('Form H') was served on the appellant notifying the award and offering compensation in the said sum which was accepted by the appellant.

[14] The deponent further asserted that Rynex Corporation was the former name of Grespa. However when the assertion was challenged by the production of the particulars of Rynex Corporation issued by the registrar of companies ('ROC'), which did not show any such change, the deponent changed his stand and averred that his earlier assertion was due to typographical error. It was then averred that the appellant Grespa and Rynex Corporation were related companies as subsidiaries of the same holding company IFQ Sdn Bhd.

[15] The learned judge in his judgment found as a fact that the appellant was neither the tenant nor the occupier of the said land or the buildings thereon to have any right or interest in the said compensation. The learned judge in arriving at such a decision has considered the fact that the tenancy agreement was entered between Asean Chemical and Rynex Corporation. It is also his finding that the assertion that Grespa was formally known as Rynex Corporation was not supported by the aforesaid company search issued by the ROC.

[16] Having perused through the affidavit evidence, the grounds of judgment and the submission of learned counsel, we were inclined to agree with his finding. The evidence clearly showed that the said tenancy agreement was entered between Asean Chemical and Rynex Corporation for the period beginning from 1 October 1992 and expiring on 30 September 1995. The application by Rynex Corporation to renew the said tenancy was rejected by the bank as the lien holder who instead granted to the latter a monthly tenancy effective from 1 March 1996.

[17] It is also noteworthy that under the tenancy agreement the tenant shall not sublet, assign, or part with the legal or actual possession of the demised premises or any part thereof without the prior consent in writing of the landlord. The affidavit evidence clearly showed that the bank, as the holding company of Asean Chemical, in its letter dated 7 June 1994 had rejected the application by Asia America Industries Sdn Bhd to have the said tenancy

extended to a new joint venture company to be formed between the latter and Rynex Corporation upon the expiry thereof. It is clearly stated in the said letter that the bank had decided not to enter into any tenancy agreement with any other party other than Rynex Corporation. By reason thereof it is also not probable that Asean Chemical or the bank could have given its consent for Rynex Corporation to sublet the said land or buildings to Grespa or otherwise to let Grespa into occupation thereof. In any event there is no evidence adduced by the appellant to show such subletting or occupation.

[18] We are also of the view that the facts and circumstances surrounding the acquisition of the said land as disclosed by the appellant's supporting affidavit together with the fact that both Grespa and Rynex Corporation are related companies as the subsidiaries of the same holding company are not sufficient proof of the appellant's occupation of the said land and buildings at the material time. Under the Act, Form E is a mere notification to all persons interested to appear at the inquiry. Likewise the issuance of Form G and the offer of compensation in Form H to Grespa are not, in our view, sufficient proof of its right and interest in the said land and buildings as the land administrator is empowered under s 36(2) of the Act, at any time of his own motion, to refer to the court for its determination as to the person entitled to such right or interest. In the present case the issuance of both Form G and Form H were challenged and disputed by Rakyat Corporation which culminated in the said reference.

[19] In our considered view, the fact that Grespa and Rynex Corporation were related companies did not confer on the former any right or interest to the said tenancy agreement unless it can be shown that it has sublet the said land or buildings to the latter or allowed it to occupy the same. The independent corporate personality of two subsidiaries were well settled. In *Owners of the Cargo Laden on the Albacrus v The Albazero* [1977] AC 774 at p 807, Roskill LJ observed:

> … each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities so that the right of one company in a group cannot be exercised by another company in that group even though the ultimate benefit of the exercise of those rights would enure beneficially to the same person or corporate body irrespective of the person or the body in whom those rights were vested in law …

[20] Learned counsel for the appellant further argued that even if no formal tenancy agreement existed between Rynex Corporation and Grespa, its can still be inferred from all the surrounding circumstances that Grespa was the tenant in the loose sense. With respect, we find no merit in the argument. Having viewed all the evidence before us, we find nothing therein from which such fact may be inferred. At the most we can only find that Grespa was a tenant at will,

if at all it existed. However the definition of 'person interested' in s 2 of the Act, from which Grespa sought support, has expressly excluded tenant at will.

[21] For all the reasons aforesaid, we are satisfied that the learned judge has not erred in fact and in law in finding that Grespa has failed to prove, on the balance of probability, the substratum of its claim.

[22] Finally we would add that since this appeal only concerns Grespa's right and interest in the said award of compensation, it is not incumbent on our part to answer the further question posed by the appellant as to whether the learned judge had correctly made the order for the said compensation to be paid to the bank.

[23] On the foregoing ground, we unanimously dismissed the appeal but with no order as to costs. The order of the High Court was affirmed, and the deposit to be refunded to the appellant.

Appeal dismissed with no order as to costs.

Reported by Kohila Nesan